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In the

Supreme Court of the United States

MARVIN D. HORNE, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CENTER FOR CONSTITUTIONAL JURISPRUDENCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF THE CENTER FOR CONSTITUTIONAL JURISPRUDENCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute. The Institute is a non-profit organization with the mission to restore the principles of the American Founding to their rightful and preeminent authority in our national life. To safeguard these principles, the Center has represented parties in litigation in state and federal courts. The Center also participates as *amicus curiae* in significant cases before this Court—including in this case when it previously was before this Court. See *Horne* v. *Department of Agriculture*, 133 S. Ct. 2053 (2013); see also, *e.g.*, *Koontz* v. *St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Arkansas Game & Fish Comm'n* v. *United States*, 133 S. Ct. 511 (2012); *Sackett* v. *Envt'l Protection Agency*, 132 S. Ct. 1367 (2012); *Stop the Beach Renourishment, Inc.* v. *Florida Dep't of Envt'l Protection*, 560 U.S. 702 (2010); *Kelo* v. *City of New London, Conn.*, 545 U.S. 469 (2005).[1]

Among the principles of the American Founding that the Center champions is the fundamental right, expressed in the Fifth Amendment to the United States Constitution, to be free of governmental tak-

[1] In accordance with Rule 37.6, the Center affirms that no counsel for a party authored this *amicus* brief in whole or in part and that no person other than the Center, its members, or its counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Letters reflecting the parties' blanket consent to the filing of *amicus* briefs have been filed with the Clerk's office.

ings of private property unless the property is taken solely for public use and just compensation is paid. Indeed, this safeguard against governmental abuse predates the United States Constitution; it is one of the oldest and most firmly established principles in the Anglo-American legal tradition. Yet the decision of the court below effectively eviscerated constitutional protection against uncompensated takings for all property other than land. Because that ruling represents a radical departure from our founding principles, the Center has a strong interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The relevant facts of this case are straightforward. Each year, the United States Department of Agriculture requires petitioners to surrender a portion of their raisin crop to the Raisin Administrative Committee (RAC), an entity that is directly overseen by the Department of Agriculture. 7 C.F.R. § 989.66(a). In the years at issue in this case, the Department required farmers to cede as much as 47 percent of their raisin crop. See RAC, *Marketing Policy and Industry Statistics* 27 (2010), *available at* http://www.raisins.org/files/Marketing%20Policy%202010.pdf.

The government's purported goal in seizing privately grown raisins is to "stabilize market conditions." Pet. App. 21a. To that end, the Raisin Administrative Committee "dispose[s]" of seized raisins in various ways at its discretion—including sometimes by destroying them or gifting them to federal agencies or foreign governments. 7 C.F.R. § 989.67.

Raisin "handlers" whose raisins are taken receive no direct and immediate compensation. 7 C.F.R. § 989.66(f).[2] Instead, the federal government provides them with a share of the uncertain—and perhaps nonexistent—future proceeds of the disposal of the seized raisins. 7 C.F.R. § 989.66(h). If the Raisin Administrative Committee chooses to dispose of the raisins in a way that generates revenue, that money is used first to pay the Committee's expenses and the costs of the regulatory program. Only if any money remains is it distributed pro rata to the farmers. *Ibid.* In the period covered by this case, raisin farmers received either compensation that was less than the cost of production or—as happened during half of the relevant period—no compensation at all. See RAC, *Analysis Report* 23 (Aug. 1, 2006), *available at* http://www.raisins.org/analysis_report/analysis_report.pdf.

Raisin handlers who refuse to comply with this program—including the petitioners here—face steep fines. Pet. App. 8a. When petitioners refused to surrender their raisins, they were fined an amount that exceeded the fair market value of the raisins that they had withheld. Pet. App. 8a n.6.

The Fifth Amendment to the United States Constitution does not permit this result, but the Ninth Circuit nonetheless held that this regulatory program does not even involve a taking. Pet. App. 22a n.16. The panel reasoned that the Fifth Amendment's "categorical rule" that the government must

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[2] "Handlers" process raisins, 7 C.F.R. § 989.15, while "producers" grow the grapes from which raisins are made. 7 C.F.R. § 989.11. Though producers often sell their grapes to handlers, petitioners in this case process their own crop, so they are both producers and handlers. Pet. App. 257a.

provide just compensation when it seizes private property applies only to real property, not to personal property such as crops. Pet. App. 17a-20a.

Petitioners have convincingly demonstrated that the Ninth Circuit's decision is contrary to this Court's precedent. Pet. Br. 33-36. The Center submits this brief to confirm that the Ninth Circuit's decision is also contrary to almost a millennia of legal tradition, from before the signing of Magna Carta, through the ratification of the Bill of Rights.

The Framers of the Bill of Rights wrote the Fifth Amendment of the United States Constitution to protect *all* types of property, both personal and real. Indeed, in declaring that private property shall not "be taken for public use, without just compensation" U.S. Const. amend. V., the Framers were codifying an ancient right that had been accepted as a part of their legal tradition since before Magna Carta. Throughout that long history, personal property was protected at least to the same extent as real property, and sometimes received even greater protection. The Ninth Circuit, however, rejected over 800 years of history in declaring that "the Takings Clause affords more protection to real than to personal property" and holding that the seizure of the personal property at issue in this case—raisin crops—does not even constitute a "taking" at all. Pet. App. 19a, 22a n.16.

The Ninth Circuit blessed the government's actions in this case because the court believed that there was a "sufficient nexus" between the government's objective ("stabilizing the domestic raisin market") and the means it chose to achieve it (seizing raisins). Pet. App. 29a. The Ninth Circuit is mistaken. When the government seizes private property, the government's objective is constitutionally irrele-

vant. Throughout history, the right to just compensation has applied with full force even when the government was seizing private property for reasons of the highest order—such as use in wars of self-preservation. The right to just compensation therefore applies with equal force in this case.

ARGUMENT

As this Court has recognized, the Bill of Rights was not written to recognize "new" rights, but rather to memorialize rights that had long been recognized under both common law and natural law. *Dist. of Columbia* v. *Heller*, 554 U.S. 570, 599 (2008); *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 34 (1991); *Dennis* v. *United States*, 341 U.S. 494, 524 (1951). In purporting to draw a distinction between the constitutional protections afforded to real property and personal property, the Ninth Circuit has departed from both the original understanding of the Fifth Amendment and from over 800 years of legal precedent.

A. Magna Carta Explicitly Required Prompt Compensation For Takings Of Personal Property.

The long tradition of protecting personal property from government seizures goes back at least as far as the signing of Magna Carta in 1215. That charter "is in many ways the spiritual and legal ancestor of what we today call the 'rule of law.'" Parker of Waddington, Lord Chief Justice of England, *Foreword* to A.E. Dick Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America*, at x (1968). Although the great charter is often studied today as "an ancestor on the family tree of American constitutionalism," *id.* at 13, it also speaks in literal

and specific terms about the precise issues raised by this case.

Among the grievances of the barons who compelled King John to sign Magna Carta was the King's abuse of the royal prerogative of "purveyance." Purveyance was, as Blackstone explained, the right of the king to "bu[y] up provisions and other necessaries * * * at an appraised valuation, in preference to all others, and even without consent of the owner." 1 William Blackstone, *Commentaries* *277. In other words, purveyance was a species of what we now call eminent domain. See *Little Rock Junction Ry.* v. *Woodruff*, 49 Ark. 381, 381 (1887) ("[Eminent domain] bears a striking analogy to the king's ancient prerogative of purveyance, which was recognized and regulated by the twenty-eighth section of *magna charta*"). This prerogative was important to English kings because the royal court in John's time was "very frequently" "removed from one part of the kingdom to another." 1 Blackstone *277. The king's right to purchase provisions at market rates ensured "that the work of government should not be brought to a stand-still for want of supplies." William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John, with an Historical Introduction* 330 (1914).

King John used purveyance not only for its traditional purpose—to support his personal retinue—but also to provision some seventy castles around England that he deemed essential to maintaining his rule. *The 1215 Magna Carta: Clause 28, Academic commentary, The Magna Carta Project*, http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_28. Castle garrisons were expensive, and they required ample stockpiles of provisions in

case of a protracted siege. *Id.* Although the use of purveyance to support garrisons was not King John's innovation, his heavy strategic dependence on castles made the practice particularly important to him, and particularly onerous to his subjects. *Ibid.*

At the time of Magna Carta, there was no dispute that the king and his deputies were obligated to pay for the provisions they took. But controversy arose because "[p]ayment was often indefinitely delayed or made not in coin but in exchequer tallies." McKechnie at 330.[3] Sometimes payment was deferred in this fashion by corrupt purveyors who sought to enrich themselves by avoiding ever making payment. *Id.* at 331; 1 Blackstone *277-78. But it is also likely that even scrupulous purveyors had difficulty making prompt payment because of the scarcity of coin at the time. 1 Blackstone *277-78.

Magna Carta contained several clauses addressing King John's abuse of purveyance. Clause 28 states (in translation) that:

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[3] Exchequer tallies were sticks used to memorialize royal debts owed to particular subjects. Marks would be made along the length of the stick to record the size of the debt, and then the stick would be split lengthwise. Each half of the stick would contain a portion of all of the lines, and because of irregularities in the wood, the sticks were difficult to forge. Each party would keep half of the stick; those halves later could be matched up to prove their authenticity. But exchequer tallies were less transferrable than coins because of the difficulty in proving to potential transferees that one half of a stick actually conformed to another half held by the Exchequer. So, in practice, Exchequer tallies' primary use was to offset the creditor's future taxes. *See* Christine Desan, *Making Money: Coin, Currency, and the Coming of Capitalism* 175-185 (2014).

> No constable or other bailiff of ours shall take corn or other provisions from any one without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.[4]

Clause 30 states that:

> No sheriff, or bailiff of ours, or anyone else is to take any free man's horses or carts for transporting things, except with the free man's consent.[5]

And Clause 31 states that:

> Neither we nor our bailiffs are to take another man's wood to a castle, or on other business of ours, except with the consent of the person whose wood it is.[6]

By requiring contemporaneous payment in coin for seizures of provisions, and by prohibiting outright seizures of horses, carts, and timber, these clauses demonstrate that protection of personal property—not just real property—and requiring prompt pay-

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[4] The original Latin reads: "Nullus constabularius, vel alius ballivus noster, capiat blada vel alia catalla alicujus, nisi statim inde reddat denarios, aut respectum inde habere possit de voluntate venditoris." Magna Carta Cl. 28, http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/!all.

[5] The original Latin reads: "Nullus vicecomes, vel ballivus noster, vel aliquis alius capiat equos vel caretas alicujus liberi hominis pro cariagio faciendo, nisi de voluntate ipsius liberi hominis." Magna Carta Cl. 30, http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/!all.

[6] The original Latin reads: "Nec nos nec ballivi nostri capiemus alienum boscum ad castra, vel alia agenda nostra, nisi per voluntatem ipsius cujus boscus ille fuerit." Magna Carta Cl. 31, http://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/!all.

ment of just compensation were central concerns of Magna Carta.

The requirement of contemporaneous payment for seized provisions was a crucial protection for the barons because promises of future payment could prove illusory. In that regard, the barons' concern mirrored those of the petitioners in this case. Petitioners did not want to surrender their raisin crops—their personal property—for a contingent future interest that might prove entirely illusory. See Pet. App. 3a ("In some years this 'equitable distribution' * * * is zero").

Indeed, because Magna Carta required immediate payment of just compensation when the government seized privately owned crops, the outcome of this case would have been an easy call in the thirteenth century. Yet the United States government now claims that it can do to raisin farmers what King John forswore ever doing to his own people.

B. The American Colonists Inherited Magna Carta's Tradition Of Just Compensation For Takings Of Personal Property.

Magna Carta was a foundational document of the English legal tradition in which the Framers of the United States Constitution were steeped.

In the centuries after the enactment of Magna Carta, its rights and restrictions on governmental power—including its requirement of just compensation for takings of personal property—were consistently reaffirmed by English monarchs and Parliaments. The charter was reissued four times—by Henry III in 1216, 1217 and 1225, and by Edward I in 1297. A.E. Dick Howard, *Magna Carta: Text and Commentary* 24 (1964). And Magna Carta was con-

firmed by parliaments at least fifty more times by 1422. J.C. Holt, *The Ancient Constitution in Medieval England, in The Roots of Liberty: Magna Carta, Ancient Constitution, and the Anglo-American Tradition of Rule of Law* 55 (Ellis Sandoz ed.,1993).

Magna Carta—and its prohibition against uncompensated takings—eventually evolved into a form of constitutional law. In 1369 Parliament expressly elevated Magna Carta to the status of "higher law" by declaring that the charter "be holden and kept in all Points; and if there be any Statute made to the contrary, it shall be holden for none.". McKechnie 185, *quoting Confirmation of Charters Act 1368*, 42 Edw. 3 c. 1. Lord Coke in an address to Parliament echoed the principle: "Magna Charta is such a fellow, that he will have no 'Sovereign'." 2 William Cobbett, *Parliamentary History of England, from the Earliest Period to the Year 1803* 357 (1807); *see also Dr. Bonham's Case*, 8 Co. Rep. 107a, 114a (C.P. 1610) ("for when an act of parliament is against common right and reason * * * the common law will * * * adjudge such act to be void"), *reprinted in* 5 *The Founders' Constitution* 303 (Philip B. Kurland and Ralph Lerner, eds., 1987).

William Blackstone confirmed that the right to just compensation was a well established aspect of the common law by the middle of the eighteenth century:

> But how does [the legislature] interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an ex-

> change. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price.

1 Blackstone *135. Blackstone's writings regularly use the term "possession" in reference to personal property.[7] His works were quite familiar to the founders. See Edmund Burke, *Speech on Conciliation with the Colonies* (Mar. 22, 1775), *reprinted in* 1 *The Founders' Constitution* 464 ("I hear that they have sold nearly as many of Blackstone's Commentaries in America as in England").

Unsurprisingly, when framing their own colonial governments, American colonists repeatedly referenced the natural rights enshrined by Magna Carta. The great charter's principle of just compensation for takings of personal property appears in colonial documents as early as 1641, when the Massachussetts General Court established a "Body of Liberties," which, in many of its provisions bears "striking" resemblance to Magna Carta. Howard, *Road from Runnymede*, at 37. In particular, the Body of Liberties stated that:

> No mans Cattel or goods of what kinde soever shall be pressed or taken for any publique use or service, unless it be by warrant

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[7] See, e.g., 2 Blackstone *389 ("[P]roperty * * * in possession * * *of any moveable chattels * * *may * * * [include] all inanimate things, as goods, plate, money, jewels, implements of war, garments, and the like; such also may be *all vegetable productions, as the fruit or other parts*, when severed from the plant, or the whole plant itself, when severed from the ground; none of which can be moved out of the owner's possession without his own act or consent, or at least without doing him an injury, which it is the business of the law to prevent or remedy") (emphasis added).

> grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford. And if his Cattle or goods shall perish or suffer damage in such service, the owner shall be suffitiently recompenced.

Massachusetts Body of Liberties (Dec. 10, 1641), *reprinted in Sources of Our Liberties* 149 (Richard L. Perry and John C. Cooper, eds., 1978).

The 1663 Charter of the Carolinas went even further, stating that the Carolina Assembly's ordinances could not extend "to the binding, charging, or taking away of the right or interest of any person or persons, in their freehold, goods or chattels whatsoever." Charter of Carolina (Mar. 24, 1663), *available at* http://avalon.law.yale.edu/17th_century/nc01.asp. The early colonists thus considered the protections against takings of personal property to be at least on equal footing with the protections afforded to real property.

The right to just compensation also appears in important founding-era declarations of rights. The language of these declarations and their historical context indicate that they protected personal property, and in particular, provisions and equipment seized by the military during wartime. For example, the Northwest Ordinance of 1787 stated:

> [S]hould the *public exigencies make it necessary, for the common preservation*, to take any person's property, or to demand his par-

> ticular services, full compensation shall be made for the same.[8]

The Massachusetts constitution of 1780 stated:

> [W]henever the *public exigencies* require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefore.[9]

And the Vermont constitution of 1777 stated:

> That private property ought to be subservient to public uses, when necessity requires it; nevertheless, whenever any particular man's property is taken for the use of the public, the owner ought to receive an equivalent in money.[10]

These references to "the common preservation," "public exigencies," and "necessity," indicate that military impressments were a key issue during those turbulent years. Indeed, in a 1778 letter to the New York Legislature, John Jay complained of "the Practice of impressing Horses, Teems, and Carriages by the military, without the Intervention of a civil Magistrate, and without any Authority from the Law of the Land." John Jay, *A Freeholder, A Hint to the Legislature of the State of New York* (1778), *reprinted in* 5 *The Founders' Constitution* 312. Such materiel

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[8] *Northwest Ordinance: An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio* (July 13, 1787), *reprinted in Sources of Our Liberties* 395 (emphasis added).

[9] Constitution of Massachusetts (Oct. 25, 1780), *reprinted in Sources of Our Liberties* 375-76 (emphasis added).

[10] Constitution of Vermont (July 8, 1777), *reprinted in Sources of Our Liberties* 365 (emphasis added).

seized by the military during a time of war was, of course, personal property.

To be sure, some colonial declarations of rights did not expressly detail just compensation protections against governmental takings. See, *e.g.*, Constitution of Virginia (June 12, 1776) § 6 ("[A]ll men * * * cannot be taxed or deprived of their property for public uses, without their own consent, or that of their representatives so elected."), *reprinted in Sources of Our Liberties* 312. But that omission appears to be because the principle was so well understood that its enumeration was not considered necessary. See, *e.g.*, *An Act for enabling the publick contractors to procure stores of provisions necessary for the ensuing campaign, and to prohibit the exportation of beef, pork, and bacon, for a limited time* (Oct. 1777) in William Waller Hening, 9 *The Statutes at Large: Being a Collection of All the Laws of Virginia* 386 (1821) (empowering officials to take beef, pork, or bacon upon "paying or tendering to the owner the price so estimated by the appraisers."). Colonial legislatures, almost without exception, provided compensation when they appropriated property for public use. James W. Ely, *"That due satisfaction may be made:" the Fifth Amendment and the Origins of the Compensation Principle*, 36 Am. J. Legal Hist. 1, 11-13 (1992).[11] And this practice of providing compensation

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[11] The one notable exception to the widespread practice of providing just compensation was that a few colonies did not provide compensation when they took unimproved land to build public roads. But, as Professor Ely has explained, there are several reasons why in the colonial context this was not a breach of the compensation principle. See Ely at 11. When land was plentiful, colonists would probably have believed that unimproved land was of little value, and rudimentary dirt roads would have constituted only a *de minimus* intrusion. *Ibid.* A road might

included takings of personal property, such as timber. *Ibid.* The fact that these early American governments so uniformly provided compensation confirmed their shared understanding that foundational principles of justice and due process required it.

The colonial legislatures recognized the right to just compensation for takings of both personal and real property implicitly; state courts issued decisions that recognized the right expressly. For example, in 1670, a Maryland court held that an uncompensated seizure of cattle was "Contrary to the Act of Parliamt [sic] of Magna Charta." *Hooper* v. *Burgess* (Provincial Ct. of Md. 1670), *reprinted in* 57 *Archives of Maryland, Proceeding of the Provincial Court 1666-1670*, at 571, 574 (J. Hall Pleasants ed., 1940). The court awarded the plaintiff compensation of "Forty Five Thousand Nyne Hundred & Fifty poundes of Tobaccoe." *Id.*[12]

Early state decisions addressing takings of real property also emphasized the importance of Magna Carta for providing the contours of the protections under natural law against governmental takings. For

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have increased the value of the adjoining land by making it accessible, perhaps facilitating improvements that had theretofore not been feasible. Moreover, "[a]s the colonies matured, and undeveloped land became more valuable, lawmakers increasingly acknowledged the right of landowners to receive compensation when the government took property for roads." *Ibid.* Finally, under Lockean natural law theories of property that would have been familiar to the colonists, wild land cannot truly be owned until someone has "mixed his labour with" it. John Locke, *Second Treatise on Government*, Chapter 5, Section 27 (1690).

[12] Tobacco was commonly used as currency in Maryland at the time. J. Thomas Scharf, 1 *History of Maryland from the Earliest Period to the Present Day* 132 (1879).

example, Chancellor James Kent, writing for the New York Court of Appeals, grounded the right to just compensation in Magna Carta. In *Gardner* v. *Village of Newburgh*, 2 Johns Ch. 162 (N.Y. Chancery Ct. 1816), the Chancellor examined a statute that authorized a village to construct a public water system. *Id.* at 162. The statute provided compensation for the owner of the stream from which the water would be taken, as well as to the owners of the land over which pipes would have to be built. *Id.* at 163-164. There was no provision in the statute, however, to compensate the owners of land adjacent to the stream for their loss in riparian rights. *Ibid.* This omission, Chancellor Kent held, rendered the statute void as contrary to "natural equity." *Id.* at 166.; *see also, e.g.*, *Bradshaw* v. *Rogers*, 20 Johns. R. 103 (N.Y. 1822) (Fifth Amendment's prohibition of uncompensated takings is simply "declaratory of a great and fundamental principle of government" arising from "natural rights and justice").

The Georgia Supreme Court expressed similar sentiments. In discussing the Fifth Amendment's just compensation requirement, the court said:

> Did not the same principle of restriction exist, both as it regards the Federal and State government, before the adoption of the amendment in question? Does the amended constitution do anything more than declare a great common law principle, applicable to all governments, both State and Federal, which has existed from the time of *Magna Charta*, to the present moment?

Young v. *McKenzie*, 3 Ga. 31, 41-42 (1847). Further examples abound.[13]

In sum, the shared understanding of scholars, colonial and early state legislatures and courts, and the framers of the United States Constitution was that the principles of natural law expounded in Magna Carta were woven into the fabric of American law. And one of the most firmly established of those principles was the prohibition against uncompensated takings of both real and personal property.

C. The Fifth Amendment Restated Magna Carta's Principle Of Just Compensation For Takings Of Personal Property.

The history of the enactment of the Fifth Amendment to the United States Constitution confirms that it was a ratification of the natural law right to just compensation for takings of all types of property—real and personal—that was articulated in

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[13] *E.g.*, *Parham* v. *Justices*, 9 Ga. 341, 349-50 (1851) (just compensation "was the law of the land in England, before *Magna Charta*. It came to us with the Common Law—it is part and parcel of our social polity—it is inherent in ours, as well as every other free government * * * as being founded in natural equity and of universal application"); *In re Public Highway*, 22 N.J. L. 293, 302 (1849) (just compensation "is a dictate of natural justice. It is founded in natural law. It has its origin back of political constitutions"); *Proprietors of the Piscataqua Bridge* v. *N.H. Bridge*, 7 N.H. 35, 66 (1834) (right to just compensation stems not only from state constitution but also is "a matter of * * * justice"); *Bristol* v. *New-Chester*, 3 N.H. 524, 535 (1826) ("[C]ompensation shall be made. And natural justice speaks on this point, where our constitution is silent."); *Bowman* v. *Middleton*, 1 Bay 252 (S.C. Ct. Common Pleas 1792) (declaring that it would be "against common right, as well as against magna charta, to take away the freehold of one man, and vest it in another without any compensation").

Magna Carta. Indeed, the Takings Clause was originally understood as embodying a preexisting legal tradition. As this Court has explained, "[t]he law is perfectly well settled that the first 10 amendments to the Constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors." *Robertson* v. *Baldwin*, 165 U.S. 275, 281 (1897). And addressing the Takings Clause in particular, Joseph Story explained that the clause was "an affirmance of a great doctrine established by the common law for the protection of private property." 3 *Commentaries on the Constitution of the United States* 661 (1833).

The addition of the Takings Clause to the United States Constitution was perhaps the least controversial of the proposed amendments in the Bill of Rights. James Madison, the initial drafter of the Bill of Rights, explained in a letter to Thomas Jefferson that in drafting the Bill, "[e]very thing of a controvertible nature that might endanger the concurrence of two-thirds of each House and three-fourths of the States was studiously avoided." Letter from James Madison to Thomas Jefferson (June 30, 1789) *in* 12 *The Papers of James Madison* 272 (Robert A. Rutland and Charles F. Hobson, eds., 1979). And the Takings Clause itself was the subject of virtually no controversy at all. It is the only right in the entire Bill of Rights that was neither proposed by a state nor debated at the Constitutional Convention.[14] To

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[14] See Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 282 (1988).

the contrary, Madison included the Takings Clause entirely of his own volition. And once Madison introduced it, the Takings Clause was accepted with only stylistic changes, generating no surviving commentary whatsoever. See James Madison, *Amendments to the Constitution* (June 8, 1789), *in The Papers of James Madison* 201 ("No person shall be * * * obliged to relinquish his property, where it may be necessary for public use, without a just compensation.").

Although Madison never explained why he included the Takings Clause in the Bill of Rights, his writings do reveal his belief that the Clause was a restatement of natural law principles that protect personal property as well as real property. In his essay, "Property," he discusses multiple conceptions of property. He explained that the Takings Clause protects only a narrow conception of property. James Madison, *Property* (Mar. 29, 1792), *reprinted in* 1 *Founders' Constitution* 598. But even that narrow exception included not only "land," but also personal property, such as "merchandise, and money." *Ibid.* Madison thus drew no constitutional distinction between the sanctity of land and that of personal property.

The nearest contemporary commentary on the Takings Clause confirms Madison's understanding. Professor St. George Tucker wrote in 1803 that the Clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressments, as was too frequently practiced during the revolutionary war, without any compensation whatever." St. George Tucker, 1 *Blackstone's Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of*

the Commonwealth of Virginia 305-06 (1803). Tucker's interpretation is bolstered by John Jay's letter to the New York Legislature in 1778, which indicated that military impressments of crops and other personal property had been a recent problem that the ratification of the Takings Clause could rectify. See *supra* p. 13.

John Jay's concern that the army was seizing goods without paying for them is the same concern that spurred King John's barons to insist upon the signing of Magna Carta in 1215. This parallel is unsurprising, despite the intervening centuries. For while governments have long found uses for privately owned land, governments have an even more pressing need to consume resources, especially during military campaigns. There may be no more fundamental conflict than that between the government's needs and the individual's property. But the proper balance was struck long ago: Governments are entrusted with the power of taking personal and real property from unwilling owners, but must always compensate them justly and promptly, ensuring that the burdens are borne equitably by society as a whole.

For constitutional purposes, there is no distinction between the Raisin Administrative Committee's seizure of raisins and thirteenth century castellans' seizure of grain: Both governmental entities must promptly pay compensation when they seize personal property. The fact that the federal government in this case purports to be seizing crops for the good of farmers does not take this case beyond the reach of the Fifth Amendment. The farmers who were forced to stock the storehouses of English castles also benefitted from the protection those castles provided.

In sum, in the 800 years since Magna Carta, the Anglo-American legal tradition—passed down in undiluted form to the Framers of the Bill of Rights—has consistently required payment of just compensation for governmental takings of personal property, such as crops. The decision below flouts that history and shared understanding of the meaning of the Takings Clause. The approach of the court below strips personal property of constitutional protections against takings, and cannot be sustained.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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